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Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA REILLY,

Petitioner,

vs.

ABBEY & ELLIS, et al., and
TUCSON ELECTRIC POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS JOHN V. TORRISI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents John V. Torrisi, et al. ("plaintiffs-respondents")[1] respectfully submit this brief in opposition to the petition for a writ of certiorari of Patricia Reilly in this action.

[1] Pursuant to Rule 24.1, the parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were John V. Torrisi, plaintiff-appellee; James Lazar and Patricia Reilly, objector-appellants; and Tucson Electric Power Company, Thomas C. Weir, Sam G. Minter, Joseph B. Wilcox, Kenneth L. Saul, and J. Luther Davis, defendants-appellees.

Although Patricia Reilly's petition to this Court lists Abbey & Ellis and numerous other law firms as respondents, those law firms were *not* parties

(Footnote continued)

STATEMENT OF JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Introduction

Petitioner Reilly has not – and cannot – set forth any cogent reasons why her petition for certiorari should be granted in this case. The so-called "notice" issue presented for plenary review simply does not present an unsettled question of federal law. The Court of Appeals decision below is not in conflict with any decision of this Court or of any Court of Appeals; in fact, it is entirely consistent with other Courts of Appeals' decisions. As shown herein, the Court of Appeals' decision was correct and this case does not present any special or important reasons for granting certiorari.

Petitioner's *ad hominem* attacks on plaintiffs' counsel reflect petitioner's perceived personal grievances regarding issues which are not properly before this Court. Such attacks are unworthy of the traditions of this Court and are belied completely by the record in this matter. Most of petitioner's statement of the case and argument contains inaccurate factual averments, improper inferences and references to facts outside the record. An analysis of the uncontroverted facts in the record shows that there is no basis for this petition and certiorari should be denied.

B. Background Of The Case

The consolidated federal court class actions, the settlement of which is challenged by the petitioner, were commenced in

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to the proceedings below. Those law firms were counsel to John V. Torrisi and the other plaintiffs-appellees in this action. We respectfully request that the Court correct the erroneous caption used by petitioner to reflect that "John V. Torrisi, et al." rather than "Abbey & Ellis, et al." are the proper respondents.

the Spring and Summer of 1989 against Tucson Electric Power Company ("TEP" or the "Company") and certain of its officers and directors. The actions were brought on behalf of purchasers of TEP common stock. The events which precipitated the lawsuits were the resignation of the Company's Chairman and Chief Executive Officer under a cloud of allegations that he improperly sold TEP common stock on the basis of inside information, public disclosure of the Company's worsening financial condition, TEP's statement that it was considering cutting its dividend and the precipitous drop in the market price of TEP common stock. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1373, 1377 (9th Cir. 1993). Generally, plaintiffs alleged that defendants violated the federal securities laws by misrepresenting the financial condition of TEP and that as a result the market price of TEP common stock was artificially inflated and plaintiffs and the members of the Class were damaged by reason of their purchases of TEP common stock at artificially inflated prices.

After these actions were filed, TEP's financial condition continued to deteriorate. TEP ultimately eliminated its stock dividends. By 1991, TEP declared a moratorium on debt payments, was negotiating with creditors to restructure its debt and had an involuntary petition in bankruptcy filed against it. *Id.* at 1376. At the same time, TEP was seeking a rate increase from the regulators at the Arizona Corporations Commission. *Id.*

Against this backdrop of impending financial doom, plaintiffs negotiated the $30 million settlement at issue in this petition. The settlement was the product of months of hard fought negotiations. As the Court of Appeals found, this settlement was fair, reasonable and adequate standing on its own and in light of the circumstances under which it was negotiated.

First, the Court of Appeals noted that the $30 million "was the maximum amount of available insurance, and the only significant source of money to fund the settlement." *Id.* at 1373.[2]

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[2] The record supports the conclusion that the Company could not contribute either cash or equity to the settlement because its creditors would not permit

(Footnote continued)

Second, TEP's financial condition was precarious and this settlement was critical to a reorganization of the Company outside of Chapter 11. *Id.* at 1376. If a settlement was not reached, it was likely that TEP would have filed for bankruptcy, "which would have left little if anything for class members." *Id.*

Third, defendants had a motion for summary judgment pending at the time the settlement was reached. Plaintiffs had not established liability and "the defendants were asserting defenses which had to be taken seriously." *Id.* at 1375.

C. The Notice And Settlement Hearing

On December 11, 1991 the District Court entered an Order authorizing notice of the proposed settlement to be mailed to known class members (the "Notice") and that a summary notice of the proposed settlement be published in the *Wall Street Journal* and *The New York Times*. *Id.* at 1373. That same Order also scheduled a hearing for February 20, 1992 to consider whether to approve the proposed settlement and class counsel's request for attorneys' fees.

Pursuant to that Order, on January 6, 1992 a copy of the Notice was mailed to 76,700 individual stockholders and to 277 brokerage firms, banks and institutions which held shares in their street names. *Id.* An additional 36,000 notices were mailed to beneficial owners of shares held in street name by the brokerage firms, banks and institutions. *Id.* A summary notice also was published in the national and international editions of the *Wall Street Journal* and *The New York Times*. Ultimately over 113,000 Notices were mailed. *Id.*

The Notice that was sent to class members described the litigation, summarized the terms of the $30 million settlement and set forth the formula that would be used for determining what each Class member who filed a valid proof of claim would

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it to do so and that the net worth of the individual defendants was insubstantial in light of the potential damages. Moreover, the insurers had raised substantial defenses to any payment under the policies. *Id.* at 1375.

receive from the settlement fund. The Notice explained in full the basis for plaintiffs' counsel's decision to settle the case including TEP's precarious financial condition, the risk and expense of further litigation, and the defenses raised by TEP. In this regard, the Notice specifically stated:

> Counsel for class plaintiffs believe that the settlement of the class actions described in this notice confers substantial benefits to the settlement class and each of its members, without the additional cost, uncertainty, and delay that would result if the class actions were to proceed against the class defendants through trial and appeal.

Lastly, the Notice advised class members that they had the right to opt out of the class, that they could object to the proposed settlement as well as plaintiffs' counsel's application for attorneys' fees and that they had the opportunity to review more detailed papers in the case and speak with plaintiffs' counsel.

At the settlement hearing on February 20, 1992, the District Court carefully considered and eventually rejected the arguments raised in each of the 20 objections to the proposed settlement. The District Court permitted all class members to be heard at the hearing irrespective of their failure to file written objections and accepted for consideration belated written objections, thus obviating any possible claim of prejudice to class members.[3]

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[3] Petitioner is in error in arguing that the District Court entered its final judgment and order of dismissal approving the settlement prior to the settlement hearing (Petition at 9). As is the regular practice in many courts, class counsel filed a proposed form of order with the Clerk of the Court prior to the settlement hearing. The District Court did not sign the final judgment and order of dismissal until all of the objectors were heard, as is evident by the signature page of the Order. (Petition at 27a). As set forth by the Court of Appeals:

> . . .The record shows that the District Court received and considered objections filed by the few shareholders who rejected the settlement, and listened to the objections of those who chose to

(Footnote continued)

The District Court approved the settlement as fair, reasonable and adequate after considering carefully TEP's precarious financial condition, the effect of a bankruptcy on class members' claims, the limited assets available to satisfy a judgment or fund a settlement despite plaintiffs' efforts to obtain an equity contribution from TEP, the fact that market losses are not an accurate measure of damages on a Rule 10b-5 claim and the availability of an opt-out right to all class members.

In connection with plaintiffs' counsel's application for an award of attorneys' fees equal to 30% of the settlement fund, the District Court considered the result achieved, the hourly rates charged, plaintiffs' counsel's specialized experience in class action cases and that class counsel had performed commendably in promptly settling the litigation in getting whatever assets were available from an "almost bankrupt utility." Following the Ninth Circuit's standard in common fund cases, the District Court reduced the requested fees from 30% to 25% of the fund obtained for the class and declined to award any interest on the fees.

D. The Decision of the Court of Appeals

The Ninth Circuit affirmed the District Court's approval of the settlement and its order awarding attorneys' fees. Among other things, the Ninth Circuit held that the Notice sent to class members was adequate and that the content of the Notice did not violate due process, that the timing of the Notice did not violate due process or Rule 23, that the settlement was fair, reasonable and adequate under Rule 23, that the award of attorneys' fees to class counsel was fair and reasonable, that the settlement hearing procedures were proper and that the creation of two subclasses was appropriate.

With respect to the notice issue raised in this petition, the Court of Appeals found that the content of the Notice sent to

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appear and argue at the hearing. Only after carefully reviewing all of the objections and considering relevant matters pertaining to the fairness of the settlement did the District Court approve it. *Id.* at 1377.

class members did not violate due process. Specifically, the Court found that the settlement Notice stated that the aggregate amount of the settlement was $30 million, that each class member's recovery will be proportional and that the Notice properly described the formula for computing each Class member's share of the settlement fund. In holding that this Notice was adequate, the Court of Appeals stated:

> In *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), objectors to the settlement of a class action made the same argument Lazar and Reilly make here. They "argue[d] that the notice [of a proposed settlement and hearing on it] did not fairly apprise class members of their positions because it did not specify their potential recovery." *Id.* at 1177. We stated that their potential recovery was "a matter of conjecture since it was unknown how many class members would opt-out or submit claims." *Id.* at 1177-78. We held that the aggregate amount of the proposed settlement and the formula for computing recoveries was all that was required. *Id.* at 1178.

Id. at 1374.

As shown herein, that holding was correct and the petition for certiorari should be denied.

REASONS FOR DENYING THE PETITION

The instant petition does not satisfy the standards for accepting plenary review. Rule 10 of this Court's Rules provides in pertinent part that certiorari shall be granted "only when there are special and important reasons therefor" — for example, when a decision of a Court of Appeals is in conflict with a decision of this Court or another Court of Appeals, or when a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. None of these circumstances exist in this case.

Petitioner argues that the due process rights of the Class were violated because the Notice did not quantify the recovery that

Class members would receive from the aggregate settlement and because the Notice somehow misled class members that they would receive a "substantial" percentage of their market losses. These issues are based on an inaccurate view of the record, and in any event, do not provide a basis for granting certiorari. There is no conflict among the Circuits and the petition does not raise a novel question of law.

A. The Court Of Appeals' Decision Is Not In Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), this Court held that the requirements of due process were satisfied if the notice in a class action was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974).

Consistent with this decision, the Ninth Circuit, citing its prior opinion in *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), held that the Notice in this case satisfied all due process requirements in that it fully described the terms of the settlement, permitted Class members an opportunity to be heard, permitted class members an opportunity to opt out of the Class, specifically stated that the aggregate amount of the settlement was $30 million, and fully described that each Class member's recovery from the aggregate settlement would be proportional based upon a formula for calculating settlement distributions. The fact that each Class member was not given an estimate of what their recovery would be simply does not raise due process concerns.

The other courts that have considered this issue are in accord. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 69-71 and n.11 (2nd Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (Judge Friendly rejected numerous challenges to a securities settlement notice that was substantially similar in scope to the one here, including a challenge that the notice was defective "because it

did not state what proportion of the class's total loss the settlement fund represented."); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir.), *cert. denied*, 456 U.S. 998 (1981) (notice of settlement was satisfactory even though it failed to provide an estimated range of recovery per unit); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122-23 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *In re Equity Funding Corp. of American Securities Litigation*, 603 F.2d 1353, 1361-62 (9th Cir. 1979) (notice does not have to disclose range of potential offsets applied against any recovery since it was obvious that the value of this offset would fall with a range of between zero and full value); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 637 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981), *Cannon v. Texas Gulf Sulfur Co.*, 55 F.R.D. 308, 313 n.2 (S.D.N.Y. 1972); *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982) (notice only required to advise Class members of general parameters of settlement, not the details).

Accordingly, there is no conflict among the Courts on what constitutes adequate notice in the context of a class action and the Notice at issue here complied with all of the requirements of due process. A class settlement notice may "consist of a very general description of the proposed settlement." *Grunin*, 513 F.2d at 122; accord, *Weinberger*, 698 F.2d at 70. "Class members are not expected to rely on the notices as a complete source of settlement information." *Grunin*, 513 F.2d at 122.

Moreover, the premise of petitioners' argument — that the recovery each Class member will get from the settlement fund is ascertainable at the time the notice is sent — is in error. The fact is the amount of each Class member's recovery need not (and indeed cannot) be set forth in the notice because the amount of each individual's recovery from the settlement is dependent upon the number of valid claims filed, the "recognized losses" realized by the Class members who filed valid claims and the number of Class members who choose to opt out of the Class. *See Weinberger*, 698 F.2d at 70 and n.11. The formula for determining proportional recovery of each Class member was set forth in full in the Notice at issue in this case.

As indicated above, the courts are uniform in holding that no more is required.

Moreover, it would be seriously misleading to compare the settlement to some estimate of "market losses" for the Class in the notice because doing so would misinform Class members about the strength and size of their claims. Under the anti-fraud provisions of the federal securities laws, an investor may recover as damages only that portion of his stock market loss that is caused by the alleged misrepresentation or nondisclosure. Price declines due to market forces or factors other than those misrepresented or concealed may not be recovered, unless rescissory damages are warranted. *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155-56 (1972), (holding that damages for violations of Section 10(b) were determined by the "out of pocket measure of damages" which is based upon the difference between the "fair value" of the stock absent any violations of Section 10(b) and the consideration paid). *See also Blackie v. Barrack*, 524 F.2d 891, 919 n.25 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976); *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77 (2d Cir. 1980) and *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38, 49 and n.22 (2nd Cir. 1978) (describing certain offsets applied to reduce market losses in computing damages). Since damages and market losses cannot be equated, it would be highly misleading to suggest otherwise. A class notice should not include misleading information about potential recoveries. *See Oswald v. McGarr*, 620 F.2d 1190, 1198-99 (7th Cir. 1980).

In sum, the Ninth Circuit held that the Notice in this case satisfied all relevant due process requirements. Other federal courts that have considered this and similar issues are in accord. Petitioner has not identified any contrary authorities. Under these circumstances, there is no basis for granting the petition for certiorari since there is no conflict with decisions of this Court or other circuits and petitioner has presented no novel question of law. *See Braxton v. United States*, 500 U.S. 344, (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeal

and state courts concerning the meaning of provisions of federal law."); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

B. The Notice Properly Informed Class Members About The Settlement And This Case Does Not Present Special Or Important Reasons For Granting Certiorari

As noted above, the Court of Appeals held that the Notice in this action fully and properly described the terms of the settlement and the rights of Class members thereunder. Petitioner mistakenly argues that she and other Class members were promised that they would recover a substantial amount of their losses if they approved the settlement. Very simply, no such representation was made.

As noted above (p. 5), the Notice simply stated that "Counsel for class plaintiffs believe that the settlement of the class actions described in this Notice confers substantial benefits to the settlement class and each of its members. . . ."[4] By any objective standard, $30 million is a substantial benefit, particularly here in light of the Company's financial difficulties. However, it takes a great leap of faith to turn this statement into a promise that Class members would recover a substantial portion of their market losses from the settlement. The petitioner's argument is based on tortured reasoning and unreasonable inferences. The Notice clearly did not promise class members that they would recover a substantial portion of their market losses. Petitioner's contrary erroneous argument does not present special or important reasons for granting certiorari.

The question of what the Notice said or did not say and the inferences to be drawn therefrom presents a factual dispute, at best, and such a dispute does not provide a basis for granting certiorari. It is well settled that "[a]n issue of fact is not 'important' for purposes of Rule 10. Normally the Court will not grant

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[4] Petitioner repeatedly misquotes the notice by italicizing, bolding and underlining the language of the Notice without acknowledging to the Court that the emphasis is supplied by petitioner.

certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a District Court . . . as to such issues, the Courts of Appeals are generally the courts of last resort." 13 J. Moore, H. Bendix, B. Ringle and K. Shirey, *Moore's Federal Practice*, § 10.41 at S.C. 10-47 (2d. Ed. 1993) (citing *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951)).

Lastly, the adequacy of the Notice at issue in this petition is demonstrated by Class members' responses in this case. The objections of petitioner and other Class members were considered fully by the District Court. Class members were fully informed about their rights under the settlement — their right to exclude themselves from the Class or object to the terms of the settlement. Indeed, if petitioner truly wanted to bring TEP's officers and directors to "public scrutiny" and to seek "some funds from the actual pockets of the individual officers and directors," she had every right to do so on her own. In fact, the Court of Appeals recognized that the circumstances at hand suggest that petitioner is merely a "spoiler" whose concerns could have been addressed in an individual lawsuit had she elected to opt out of the settlement. *Torrisi*, 8 F.3d at 1378. The thousands of Class members who support this settlement should not suffer on account of petitioner's misunderstanding of the notice and her unrealistic, personal gripes.

CONCLUSION

Petitioner has used the petition as a stage from which to broadcast her perceived grievances with this settlement and with class actions generally. Petitioner's personal views, however, do not give rise to circumstances warranting granting certiorari. Given that there is no conflict in the lower courts on any legal issues raised by petitioner and given that petitioner merely challenges the Ninth Circuit's decision to uphold the District Court's findings that this settlement is fair, reasonable and adequate and that the Notice was proper, this case is clearly not worthy of this Court's attention.

For the foregoing reasons, the Court should not grant the petition for a writ of certiorari.

Dated: New York, New York
May 26, 1994

Respectfully submitted,

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